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SUMMONS.

State of New Jersey to Herman Maurer:

(L. S.) YOU ARE SUMMONED to answer the annexed complaint of Joseph Weisberger in an action at law in the Essex County Circuit Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court at Newark within twenty days after service upon you of this writ and the annexed complaint, plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM A. SMITH, Judge of the Essex County Circuit Court at Newark this 22nd day of October, 1930.

JOHN H. SCOTT,
Clerk.

KESSLER & KESSLER,
Attorneys.

To the within-named defendant:

TAKE NOTICE that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof judgment will be entered against you.

KESSLER & KESSLER,
Attorneys for Plaintiff.

COMPLAINT.

Filed October 22, 1930.

Essex County Circuit Court

JOSEPH WEISBERGER,
Plaintiff,
vs.
HERMAN MAURER,
Defendant.

Action at Law.
Complaint.

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, complaining of the defendant says:

FIRST COUNT.

1. In or about the month of August, 1929 and at all times mentioned herein the plaintiff, Joseph Weisberger, was the owner of premises located at and known as 25-27 Coe Place in the City of Newark, New Jersey, upon which premises plaintiff was performing certain excavating work.

2. At the time aforesaid the defendant, Herman Maurer, was the owner of premises located at 624 High street in the City of Newark aforesaid, which premises abutted upon and were adjacent to the land of the plaintiff.

3. The said lands were so situated that the curb to which the land of the defendant was referred was at a higher level than the curb to which the land of the plaintiff, and the said excavation work, was referred, the said lands slop-

ing at a grade from plaintiff's land upward to the land of the defendant.

4. The defendant had theretofore caused his land to be filled in by artificial means in order to raise the grade thereof, and had caused to be erected upon said filled-in land certain garages and other structures which abutted upon plaintiff's land and premises and which were laterally supported by plaintiff's land.

5. The excavation work on plaintiff's land was not nor was it intended to be carried to a depth of more than eight feet below the curb to which it was referred.

6. By reason of the excavating work being done upon the land of the plaintiff it became necessary to build and erect a retaining wall at the rear of said property to protect and preserve the property of the defendant and to safeguard and support the filled-in land of the defendant and the structures thereon erected by the defendant.

7. By reason of the provisions of a certain ordinance of the City of Newark, New Jersey entitled "An Ordinance to Regulate the Construction, Repair, Alteration and Removal of Buildings within the City of Newark, New Jersey," known as the Building Code of the City of Newark, and more particularly Section 66 of said Building Code, it became and was the duty of the defendant to build said retaining wall at his own expense.

8. Plaintiff gave due notice of the excavating work which he was about to perform to the defendant and demanded of the defendant to build said wall, but defendant refused and neglected

and still does refuse and neglect to build and erect the said retaining wall.

9. Plaintiff thereafter notified defendant that he would secure estimates for the construction of said wall and submitted said estimates to the defendant but defendant still refused to erect said wall, and thereafter plaintiff proceeded to construct said retaining wall to preserve the property of the defendant and to safeguard his own property from damage.

10. Plaintiff has necessarily expended in the construction of said retaining wall the sum of $8,700.50.

11. Plaintiff has demanded payment of the said sum of $8,700.50 from the defendant, but defendant has refused and neglected and still does refuse and neglect to pay the same.

SECOND COUNT.

1. Plaintiff repeats the allegations contained in paragraphs 1, 2, 3, 4 and 5 of the first count.

2. By reason of the fact that the lands of the defendant were situated at a considerably higher level than the lands of the plaintiff and as a result of the negligence and carelessness of the defendant in not building a retaining wall, great quantities of dirt and debris from the lands of the defendant were caused to fall into and upon the lands and premises of the plaintiff, greatly to the damage thereof.

3. It thereby became the duty of the defendant to erect a retaining wall at the rear of his property in order to support the filled-in land and the structures erected upon his said property, and in order to safeguard and protect the

premises of the plaintiff and to prevent any further damage to plaintiff's land.

4. Plaintiff gave due notice thereof to the defendant and demanded of the defendant to build such wall, but defendant refused and still does refuse to build the same.

5. Thereafter, in order to minimize any further damage and to prevent further injury to his premises, plaintiff secured estimates for the erection and construction of such a wall and gave due notice of such estimates to defendant, but defendant still refused to erect said wall, wherefore plaintiff proceeded to erect said retaining wall at the rear of his property.

6. Plaintiff has expended the sum of $8,700.50 for the erection and construction of said wall.

7. Plaintiff has demanded payment of said sum of $8,700.50 from the defendant, but defendant has refused and neglected and still does refuse and neglect to pay the same.

THIRD COUNT.

1. In or about the month of August, 1929 and at all times mentioned herein the defendant, Herman Maurer, was the owner of premises at 624 High street, Newark, New Jersey, which premises abutted upon and were adjacent to the premises owned by the plaintiff and located at 25-27 Coe Place in the City of Newark, New Jersey.

2. At the time aforesaid defendant had constructed upon his said premises and maintained thereon a certain pipe or culvert for the collection and discharge of surface and drainage

waters, which pipe had its outlet upon the lands and premises of plaintiff.

3. It thereby became the duty of the defendant to maintain said pipe or culvert in a lawful and proper manner so as not to cause the same to discharge surface waters upon the land of the plaintiff.

4. Notwithstanding said duty and in violation thereof, defendant maintained said pipe or culvert unlawfully, improperly, negligently and in a defective condition, whereby great quantities of water were caused to be discharged upon the lands and premises of the plaintiff, greatly to the damage thereof.

5. At the time aforesaid plaintiff was performing certain construction work in and upon his premises.

6. By reason of the unlawful acts of the defendant as aforesaid, the said waters were caused to be discharged in and upon the said construction work, causing considerable damage thereto and ruining great quantities of material used by plaintiff in said construction work, and whereby the said construction was delayed for a considerable period of time, greatly to the damage of plaintiff.

7. By reason of the unlawful acts of the defendant as aforesaid, plaintiff has suffered damages in the sum of $2,500.00.

WHEREFORE plaintiff demands as damages against the defendant the sum of $25,000.00, together with lawful interest and costs of suit to be taxed.

KESSLER & KESSLER,
Attorneys for Plaintiff.

NOTICE OF MOTION TO STRIKE OUT COMPLAINT.

Filed October 28, 1930.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH WEISBERGER, *Plaintiff,* *vs.* HERMAN MAURER, *Defendant.*	*Action at Law.* *Notice.*

To Joseph Weisberger, plaintiff, or Kessler & Kessler, attorneys for plaintiff.

SIRS:

PLEASE TAKE NOTICE that I shall apply to his Honor, Worrall F. Mountain, Judge of the Essex County Circuit Court, or such other Judge as may be then sitting, to hear motions, on Friday, October 31, 1930, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, at the Court House in the City of Newark, for an order to strike out the first count of the complaint filed by you in the above stated cause for the reason that same does not state a cause of action against the defendant; and further for an order to strike out the second count of the aforesaid complaint for the reason that the same does not state a cause of action against the defendant, and further, for an order to strike out the third count of the aforesaid complaint, for the reason

that the same does not state a cause of action against the defendant.

Respectfully yours,

PHILIP J. SCHOTLAND,
Attorney for Defendant.

Dated: October 27, 1930.

OPINION.

Filed January 5, 1931.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH WEISBERGER, *Plaintiff,* *vs.* HERMAN MAURER, *Defendant.*	*On Motion to Strike Out Complaint.*

Philip J. Schotland, Esq., for the motion.

Samuel I. Kessler, Esq., contra.

DUNGAN, *J.*

This is a motion to strike out the plaintiff's complaint, the first count of which charges the defendant with failure to protect his land and structures thereon against the excavation of the plaintiff upon his adjoining lot to a depth not greater than eight feet, which was done by the plaintiff, after notice to the defendant and after the defendant's failure to do so, and the plaintiff seeks by this suit to recover from the defendant the cost of a retaining wall erected by him for the purpose of affording such protection.

The second count charges that, as a result of the defendant's failure, dirt and debris from the defendant's land fell upon the land of the plaintiff to his damage and to prevent further injury to his premises he erected a retaining wall, the cost of which he seeks to recover from the defendant.

The third count charges that the defendant collected and discharged upon the plaintiff's adjoin-

ing land, surface and drainage water to the damage of the plaintiff.

Plaintiff relies upon Sec. 66 of the Building Code of the City of Newark which provides—

"Excavations not exceeding 8 feet.

> 1. If such excavation is not intended to be, or shall not be, carried to a depth of more than eight feet below the curb, the owner of any wall, building or structure, the safety of which may be affected by said excavation, shall preserve and protect the same from injury, and support the same by proper foundations; and, when necessary for that purpose, shall be permitted to enter upon the premises where such excavation is to be made. In case such wall, building or structure, however, is so located that the curb to which it is properly referred is at a higher level than the curb to which the excavation is referred, such part of the necessary underpining or foundation as may be due to the difference in curb levels, shall be made and maintained at the joint expense of the person causing the excavation to be made and the owner of such wall, building or structure. (Building Code 1928 Revisions, page 40.)

and claims that such provision is authorized by Chapter 152, Laws of 1917, p. 319, Art. XIV, Sec. 1, which authorizes municipalities "To make, publish, enforce, amend or repeal ordinances" for certain purposes, one of which is par. x p. 355

> To regulate excavations below the established grade or curb line of any street in any such municipality, not greater than eight feet, which the owner of any land may make, in the erection of any building upon his own property; and to provide for the giving of notice, in writing, of such intended excavation to any adjoining owner or owners, and that they will be required to protect and care for their several foundation walls that may

> be endangered by such excavation; and to provide that in case of the neglect or refusal, for ten days, of such adjoining owner or owners to take proper action to secure and protect the foundations of any adjacent building or other structure, that the party or parties giving such notice, or their agents, contractors or employees, may enter into and upon such adjoining property and do all necessary work to make such foundations secure, and may recover the cost of such work and labor in so protecting such adjacent property; and to make such further and other provisions in relation to the proper conduct and performance of said work as the governing body or board of the municipality may deem necessary and proper.

It will be observed that this paragraph x authorizes an ordinance to provide for giving notice of the intended excavation to the adjoining owner to protect and care for his foundation walls that may be endangered by such excavation, and to provide that if he neglect or refuse for ten days to do so, the party giving the notice *may enter upon such adjoining property, and do the work necessary to make such foundations secure,* and recover the cost of such work and labor.

Sec. 66 of the City ordinance is not in accord with this provision of the statute, but provides that *the owner of the structure* shall be permitted, when necessary, to enter upon the *premises where the excavation is to be made* in order to preserve and protect his structures from injury, but gives no right to the excavating owner to go upon his neighbor's land and do the work necessary to make his foundations secure, as contemplated by the statute nor does it provide for notice to the owner of the structures, nor pro-

vide that upon his failure to protect his structures, the excavating owner may do so at his expense. The statute does not authorize an ordinance permitting an excavating owner to build a retaining wall on his own premises at the expense of the owner of the structures, but only to authorize him to go upon the land of the owner of such structures and there do the necessary work to make his foundations secure. This the plaintiff did not do.

In addition to this statute and ordinance, the plaintiff relies upon the case of *Eads* v. *Gains*, 58 Mo. Ap. p. 586, where recovery was permitted under circumstances similar to those in this case; but, while the general principles stated in that case as to the rights and liabilities of adjoining owners are followed in this state, our courts have not held that where an abutting owner, having structures upon his land, fails upon notice to protect them from falling into the excavation, the adjoining owner may do so at his expense when the erection of such a wall is necessary. It may be that, upon such failure, if damage result to the excavating owner's property, he may be liable for that damage, but that is not the theory of plaintiff's case. What he seeks to recover is not damage for the dirt and debris which fell upon his premises, but the cost of a retaining wall built by him.

The case of Flanagan Bros. Mfg. Co. *v.* Levine, 125 S. W. 1172, also a Missouri case, holds that the purpose of giving notice is "For the purpose of giving the owner of the adjoining property warning and opportunity to protect his building," and that the duty which the owner of a building owes to keep his house from falling into the excavation, is to himself.

Opinion.

I am impressed by the argument in defendant's brief, that "If I own a shack worth less than the cost of protecting it, it seems very high handed to allow the adjoining owner to protect it regardless of cost, at my expense. It may fall and do no damage. It may not fall at all."

Until the plaintiff is damaged, no right of action accrues to him for the failure of the owner of the structures to protect them, and then he may bring an action for such damage, not for the cost of a wall erected by him in anticipation of an injury which may never occur.

These views result in striking out the first and second counts.

As to the third count, there is no doubt that a land owner has a right to change the grade of his land and to erect buildings thereon in such a way as to cause surface water to flow upon the land of his neighbor, and if such neighbor be damaged thereby it is *damnum absque injuria,* but I have never understood that rule of law to permit him to construct and maintain a "Pipe or culvert for the collection and discharge of surface and drainage water upon his neighbor's land" to his damage, as charged in this count of the plaintiff's complaint.

The motion to strike out the third count will be denied.

NELSON Y. DUNGAN,
Circuit Court Judge.

ORDER STRIKING OUT COMPLAINT.

Filed January 20, 1931.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH WEISBERGER, *Plaintiff,*	*Action at Law.*
vs.	
HERMAN MAURER, *Defendant.*	*Order.*

Defendant having moved to strike out the first count of the complaint in the above-entitled cause on the ground that same does not state a cause of action against the defendant; to strike out the second count on the ground that same does not state a cause of action against the defendant, and for an order to strike out the third count of the complaint in the above-entitled cause, on the ground that the same does not state a cause of action against the defendant, and arguments for plaintiff and defendant, by their respective counsel, having been duly heard;

It is, on the 16th day of January, Nineteen Hundred and Thirty-one, on motion of Philip J. Schotland, attorney for the defendant, ORDERED that the first and second counts of the complaint in the above-entitled cause be stricken out, on the ground that they do not disclose any cause of action against the defendant, and the motion to strike out the third count of the complaint in the above-entitled cause is hereby denied.

NELSON Y. DUNGAN,
Circuit Court Judge.

RULE FOR FINAL JUDGMENT.

Filed April 2, 1931.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH WEISBERGER, *Plaintiff,* *vs.* HERMAN MAURER, *Defendant.*	*Action at Law.* *Rule for Final Judgment.*

A motion having been made in this cause before Judge Nelson Y. Dungan in the Essex County Circuit Court to strike out the complaint filed herein on the ground that the same does not disclose a legal cause of action, and the Court having considered said complaint and having heard and considered the arguments of counsel thereon, it is thereupon on this 31 day of March, 1931,

ORDERED that the first and second counts of the said complaint be and they are hereby stricken out, and that final judgment be entered for the defendant on the first and second counts of said complaint.

Judgment entered this 31 day of March, 1931.

NELSON Y. DUNGAN,
Judge.

STIPULATION DISCONTINUING THIRD COUNT.

Filed

ESSEX COUNTY CIRCUIT COURT.

JOSEPH WEISBERGER, *Plaintiff,*		*Action at Law.*
vs.		
HERMAN MAURER, *Defendant.*		*Stipulation.*

It is hereby stipulated by and between the parties hereto that the third count of the complaint filed by the plaintiff herein be and the same is hereby discontinued; provided however, that the plaintiff reserves the right, upon notice to the defendant, to reinstate the same and to proceed to final hearing thereon, upon the final determination of the appeal now pending in this cause. In the event that said third count is so reinstated by the plaintiff, defendant shall have twenty (20) days from the date of such reinstatement to file his answer or other pleading thereto.

KESSLER & KESSLER,
Attorneys for Plaintiff.

PHILIP J. SCHOTLAND,
Attorney for Defendant.

NOTICE OF APPEAL AND GROUNDS.

Filed

ESSEX COUNTY CIRCUIT COURT.

JOSEPH WEISBERGER, *Plaintiff,* vs. HERMAN MAURER, *Defendant.*	*Action at Law.* — *Notice of Appeal and Grounds.*

To Herman Maurer, defendant; and Philip J. Schotland, Esq., attorney for defendant.

SIRS:

PLEASE TAKE NOTICE that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. Because the Essex County Circuit Court erred in holding that an excavating owner of lands has no right to erect a retaining wall at the rear of his property to protect his excavation and to prevent the abutting owner's structures from falling into the excavation, when the erection of such a wall is necessary in order to protect such structures and in order that the excavating owner may excavate with reasonable care, and to charge such adjoining owner with the cost of erecting such a wall, after notice to the adjoining owner and failure by him to act.

2. Because the Essex County Circuit Court erred in holding that the duty of a landowner to

protect artificial structures upon his land from the results of an excavation on adjoining land, is a duty which said owner owes only to himself and not to the excavating owner.

3. Because the Essex County Circuit Court erred in not holding that an owner of lands upon which are erected artificial structures owes a duty to an adjoining excavating owner to protect such structures from falling into the excavation, after notice to him by the excavating owner, and a further duty of protecting his said structures when such protection is necessary in order that the excavating owner may pursue his excavation with reasonable care.

4. Because the Essex County Circuit Court erred in not holding that where an owner of lands upon which are erected artificial structures fails, after notice, to protect such structures from the results of an excavation on adjoining lands, where such protection is necessary in order to prevent such structures from falling into the excavation and in order that the excavating owner may pursue his excavating with reasonable care, that then the excavating owner may take such steps as are necessary in order to protect such structures and charge the expense to the owner of such structures.

5. Because the Essex County Circuit Court erred in holding that Section 66 of the Building Code of the City of Newark gives no right to an excavating owner of lands to protect an adjoining owner's structures, at the expense of such adjoining owner, where such protection is necessary to prevent the structures from falling into the excavation and in order to permit the excavation to be performed with reasonable care,

after notice to the said adjoining owner and failure by him to act.

6. Because the Essex County Circuit Court erred in holding that the Building Code of the City of Newark creates no duty on the part of an owner of lands upon which are erected artificial structures to protect the same from the results of an excavation on adjoining lands, and that this duty is owing to the said excavating owner.

KESSLER & KESSLER,
Attorneys for Plaintiff.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH WEISBERGER, *Plaintiff-Appellant,* *vs.* HERMAN MAUER, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

This is an appeal from a judgment of the Essex County Circuit Court striking out the first and second counts of appellant's complaint on the ground that they do not set forth a cause of action against the defendant.

The facts as stated in the complaint and which were admitted to be true for the purpose of the motion, are briefly as follows:

Appellant is the owner of land fronting upon Coe Place in the City of Newark, New Jersey. Defendant owns property adjoining on the west and fronting on High Street. Both properties are situated on a hill having a very steep grade, and the defendant's land is considerably higher than that of the appellant.

Defendant's land is filled in and artificially built up and has erected thereon garages and other structures.

Appellant, after notice to the defendant, proceeded to excavate his land to a point not more than eight feet below the curb level of Coe Place, upon which his land fronted. Because of the

steep grade of the property, the excavation resulted in an embankment thirty-six feet high at the rear lines of both parties and caused the lateral support to be removed from defendant's land.

After the excavation had proceeded to a certain point some distance from the rear line of the property, defendant's land started to fall into the excavation and there was imminent danger of both the lands and structures of the defendant being undermined and falling into appellant's excavation, with a resulting damage to both parties. It therefore became necessary that a retaining wall be built to preserve and protect defendant's property and structures, and to permit appellant to proceed with his excavation with reasonable care and safety to both parties. Demand was made upon the defendant to erect this retaining wall, but defendant took no steps to laterally support his land or to protect his structures. Appellant could not proceed further with his excavation and, after notice, proceeded to erect such a retaining wall, and now seeks to hold defendant for the reasonable cost of said wall.

Appellant contends in the first count that it was the defendant's duty to erect this wall by virtue of the provisions of the Building Code of the City of Newark.

Under the second count appellant alleges a duty upon the defendant to laterally support his own land and structures and to erect this wall in order that appellant could proceed with his excavation with a reasonable degree of care and safety, and upon the hypothesis that unless such wall were built by the defendant, appellant

would be deprived of the normal use and enjoyment of his property and property rights.

The third count of the complaint, which involved an entirely different cause of action, is not in question upon this appeal.

In the argument which follows, we shall first discuss the second count, without reference to the provisions of the Building Code.

Argument.

The general law on the question of lateral support is not in dispute in this case. The authorities in this State are all in accord that there is no such right except as to land in its natural state. In the present case, therefore, plaintiff was under no duty to furnish such support to the defendant's land. As a corollary to this rule, it must follow that plaintiff had the right to withdraw the lateral support afforded by his soil to the adjacent structures, and to excavate to the limits of his boundary lines without liability to the defendant.

> "As a landowner has the entire dominion over the whole of his estate, he has the undoubted right to excavate on his own land and close to the line of his neighbor."
> 1 *Corpus Juris* 1214.

This rule follows naturally from the fundamental right of every landowner to use and beneficially enjoy his property to the fullest extent and to its highest use, provided he does so without detriment to the rights of others.

The only duty imposed upon the excavator is that of exercising reasonable care in the performance of his work. This duty can never be

modified and all cases involving the question of lateral support uphold this duty.

> "As to land in its natural condition, there is a right to support from the adjoining land; as to buildings on or near the boundary line there is no right of action *in the absence of improper motive or of carelessness* in the execution of the work. The owner may, for any lawful purpose, excavate and remove his supporting soil without any liability for injury occasioned thereby, provided that he does not act wantonly or without the exercise of due care and prudence."
> *Schultz* v. *Beyers,* 53 N. J. L. 442.

> "For an injury resulting to anything which has been placed upon the land, produced by the removal of the soil from the adjacent land, the owner of the adjacent land is not legally responsible unless such removal has been done in a negligent manner."
> *Pullen* v. *Stallman,* 70 N. J. L. 10.

> "Where buildings are erected on land and excavations done on adjoining land in an ordinarily careful manner, there is no duty under the common law upon the person lawfully making the excavation to shore up and protect the buildings on the adjoining lands."
> *Pinto* v. *Foo Jang Realty Co.,* 2 N. J. Misc. 887.

So, although appellant was justified in his excavation to go to the very limits of his boundary line and to remove the lateral support from the adjoining land, still he was duty bound to pursue such a course with reasonable care and to refrain from wanton injury or negligence in the performance of the work.

It is our contention in the instant case that in order to excavate with reasonable care it became necessary that a retaining wall should be

built, and we are fully appreciative that in order to recover we must sustain the burden of proving this necessity. It must be noted that the circumstances surrounding this case are most peculiar. The defendant's property is considerably higher than that of the plaintiff, the ground sloping at a very steep grade, so that while our excavation was not below the curb level of Coe Place, to which it was referred, the resulting embankment at the rear line of the property was thirty-six feet high. This thirty-six foot excavation was surmounted by garages built upon the defendant's land at the rear of defendant's property. The walls of these garages were in obviously defective condition. Defendant was notified of this condition by the appellant and warned to safeguard them from the results of the excavation. Thereafter and while excavation was still more than twenty-five feet from the defendant's property line the defendant's soil collapsed and a cave-in resulted which not only damaged defendant's garages, but caused great quantities of earth to fall onto appellant's land and into his excavation. These facts, we believe, are not disputed.

The situation presented was this: While the appellant, in the exercise of his prerogative to fully enjoy his property rights, was still entitled to continue his excavation for the remaining twenty-five feet without regard to any damage that might ensue, prudence and reasonable care dictated that the appellant could not so continue unless steps were taken to shore up defendant's land. Appellant could not, with safety to himself, disregard the certain consequences of additional excavation nor could he, without incurring liability, disregard his duty to exercise reason-

able care in excavating further. Such reasonable care was, under the circumstances and facts presented, the immediate erection of a retaining wall. Such a course was necessary not only to safeguard himself or to protect the property of the defendant, but to minimize any further damage which might, and in all probability would, occur.

Workmen were engaged in the excavation and appellant had considerable quantities of machinery and materials therein. When faced with the almost certain probability of having defendant's soil and structures cave in upon him at any moment and at every further foot which he might excavate, it cannot be denied that the course pursued was the most reasonable one.

> "In the first place, in proceeding with the excavation ordinary care must be exercised. The excavator cannot proceed with violent methods that will unnecessarily endanger his neighbor's building. He cannot negligently trench upon his neighbor's soil so as to remove or weaken the protection to the building, nor can he use antiquated or disapproved methods in doing the work. He is required to make such use of his own property in a careful and prudent manner as will not unnecessarily endanger or damage the building of his neighbor. It may also be said that the degree of care to be exercised must be commensurate with the apparent or actual danger confronting the parties.
>
> "No method which may be designed by even the greatest expert is so perfect but what it may result in criticism and in a charge of negligence, and had actual damage to any of the buildings resulted from the method employed it is not unlikely that a suit of damages might have resulted.

> "Experience proves that the safest method under circumstances like those involved here, as a rule, is the cheapest in the end."
> *Christensen* v. *Mann,* 204 N. W. 499.

Not only was it necessary to build this wall in order that the excavation might proceed with reasonable care, but the appellant was under a further duty to minimize and mitigate any damage which might occur. One cave-in had already occurred. If the appellant continued to excavate it was certain that defendant's entire land would fall in upon him and that the garages would be entirely destroyed. Appellant would have been compelled to endure continuous landslides with the resultant damage to both parties at every foot which he excavated. Not only would this be very costly to the plaintiff, but it would prolong the work of excavating for an interminable time until the entire grade of defendant's land would be changed.

It may be urged that appellant would have had a right of action in trespass each time defendant's land should slide into appellant's. Had appellant contented himself with merely removing this dirt and debris each time this landslide occurred, it will be proven that the entire yard of the defendant would have been undermined and caused to sink to a new level. Furthermore, as it will be proven, the cost of such a course and the delay caused in the excavating would have meant a prohibitive expense. Appellant, under his duty to mitigate damages, was bound to pursue the safest and cheapest course—that of building a retaining wall.

It is our contention that the law casts upon the defendant the affirmative duty of protecting and preserving his own premises and of laterally

supporting his own land in such a manner that appellant should not be hampered in the use of his property or deprived of its enjoyment for the uses to which it is put. This duty is clearly recognized in the cases which we shall cite herein.

The question here presented, although raised in one New Jersey case which we shall later mention, has never been passed upon in this state, but has been the subject of judicial consideration in numerous cases throughout the country.

In the case of *Christensen* v. *Mann,* 204 N. W. 499, (Wisconsin Supreme Court), under facts similar to the case at bar, the court allowed recovery to the excavator against the owner of adjoining lands. In that case the excavation had proceeded to a point some distance from the defendant's property line. The court said:

> "Up to that time Mann had taken no steps whatever to protect the south wall of his building and it became apparent to all of the parties that if the excavation proceeded up to the line of the two adjoining properties without resorting to some means whereby the walls of the Mann building would be amply supported, great danger would be encountered by the possibility of the wall giving way and caving in onto the property of the defendants, Sklute and Komiss, thereby resulting in great danger to both adjoining owners."

The court in its opinion used the following language:

> "The principle established by the authorities is that one land owner cannot, by altering the natural condition of his land, deprive the adjoining owner of the privilege of using his own land as he might have done before; and secondly that he cannot, by building a house near the margin of his line, prevent

his neighbor from excavating his soil though it may endanger his house. (1 R. C. L. 381.)

"If this were not so an owner, by building upon the dividing line or in close proximity thereto, could limit his neighbor in his right to use his land for a legitimate purpose in accordance with his own wishes.

"In proceeding with the excavation ordinary care must be exercised. It may also be said that the degree of care to be exercised must be commensurate with the apparent or actual danger. So that the general proposition may be laid down that the degree of care required in each particular case depends largely upon the peculiar facts and circumstances and the physical condition existing in each case."

"It was the privilege of the owners of the Arcade to erect such a structure upon their own premises as would meet with their individual requirements. This is a right which is accorded under nearly all the authorities, and in view of the obligation of the owner of a building built in close proximity to the line of his neighbor, to protect his own building upon receiving proper notice, *it would hardly be logical to hold that the owner of the adjoining property must build his building so as to relieve his neighbor of the duty imposed upon him by law.*"

"For many years last past the larger cities in this country have added immensely to their population. The trend of population has been from the rural communities to the cities, which has resulted in large and extensive congested areas, greatly enhancing such areas in value. As values have unprecedentedly soared, and as taxes have increased by reason of such increased values, it followed that the owners of business properties in cities found it necessary to avail themselves of the greatest possible use which can be made of their respective properties. As property rights extend upward from the

> surface to an unlimited extent, they also extend downward into the soil, and the right of an owner to use his property both upwards and downwards may be modified or restrained only by the law making power in the exercise of the police power or by the exercise of the power of eminent domain."
>
> "The case of Eads *v.* Gains (hereafter cited in this brief) is one of the leading cases in the books and is frequently cited in the authorities on the subject of lateral support, and the law applicable to the instant case is there enunciated in clear and forceful style. * * * The Eads case meets with our approval and we quote it as expressive of the law upon this subject not only in this state, but by the great weight of authority in other jurisdictions."

In this case the objection was raised that the plaintiff did not pursue the most inexpensive and reasonable method of shoring up the defendant's property. In this connection the court said:

> "As already stated, the degree of care required in the work of protecting a building under the circumstances herein existing must be commensurate to the actual or apparent danger confronting the parties. There was involved not only protection to property, but the protection of human life. Under these circumstances the safest and best method should be resorted to. * * * No method which may be designed by even the greatest expert is so perfect but what it may result in a charge of negligence, and had actual damage resulted to any of the buildings from the method involved, it is not unlikely that a suit for damages might have resulted. * * * Experience proves that the safest method under circumstances like those involved herein, as a rule, is the cheapest in the end."

The case of *Eads* v. *Gains,* 58 Mo. App. 586, upon which the Wisconsin court bases its decision, is recognized as the leading authority on this question in the country. Here the plaintiff sued for the reasonable expense incurred in shoring up the wall of defendant's building which stood on the line between the properties of both parties. Plaintiff, in accordance with an ordinance of the City of St. Louis, gave notice as required to the defendant that she should underpin or sustain the walls of her building during the construction of a foundation wall proposed to be erected upon the plaintiffs lot. The defendant wholly disregarded the notice and failed and refused to underpin as requested. It will be noted that these facts are almost identical with those in the case at bar. The court held:

> "At common law the owner of lands has the right to lateral support of his land and of the soil only; there is no easement of support in his buildings. It is the duty of the owner of lands where buildings are erected, upon notice of an intended excavation on an adjacent lot which would probably injure or destroy such structures, to shore up and protect them from the result of such excavation. (Thompson on Negligence, 276-278.)
>
> "The unquestionable right of a landowner to remove the earth from his own premises adjacent to another building, is subject to the general qualification that he shall use reasonable care to cause no unnecessary damage to his neighbor's property in so doing. The landowner has the right to excavate upon his property and the adjoining owner has the duty of shoring up *in order that the excavating party may be able to fully enjoy his property.*
>
> "As a corollary to this proposition the land owner has the right to withdraw the lateral support afforded by his soil to the adjacent structures.

"If, in exercising such right, and because of the failure of the adjoining owner to perform his duty to protect his building, he suffers the additional loss and expense of giving artificial lateral support *in order to excavate with reasonable care,* it must result that he is damaged to the extent of this outlay in the enjoyment of his property rights, and that damage is caused by the breach of duty of the householder in not protecting his building when notified.

"Any other hypothesis would lead to the absurd conclusion that the erection of the building carries with it the incidental right to subject the adjoining proprietor to its lateral support. For if the householder, notwithstanding that he has no right to the support of his building from the soil of another, may prevent the free use of that soil by the other without undergoing a loss and expense for lateral support of said building, it is obvious that the rule denying any liability for lateral support is substantially subverted. The law preserves the substance of the rights of parties and will not permit an advantage to be indirectly gained which could not be directly claimed."

The authority laid down in the Eads case has been followed in the subsequent Missouri decisions given below:

"It is an indisputable proposition that if the plaintiff refused to shore up her building if necessary to protect it or any part of it from falling into the excavation, the defendant himself had the right to enter upon her premises and shore up."

Waters v. *Hamilton,* 75 Mo. App. 237.

"The cost of shoring up, underpinning, or taking whatever precautions may be needed to prevent injury to adjacent structures from excavating, when carefully done, falls on the owner of the adjacent structure."

Carpenter v. *Reliance,* 103 Mo. App. 480.

In the later case of *Flannagan Bros.* v. *Levine,* 142 Mo. App. 242, in a case involving similar facts, the court denied recovery on the ground that the plaintiff did not allege the erection of a wall to be *necessary* in order to preserve some right of the plaintiff, and that plaintiff therefore acted as a volunteer in proceeding with the construction.

It has been urged that this decision impairs the authority of the Eads case, and the decision in the court below was apparently influenced by this finding.

We respectfully submit that this later decision in no wise impairs or detracts from the rule as laid down in the earlier case, but is in entire harmony with it. In fact the court cites the Eads case with approval. We quote from the Flannagan case:

> "If anything more is needed as by shoring or underpinning, it is the duty of the owner of the building to do it and not that of the adjoining proprietor, and the latter is under no obligation to protect the building otherwise than by due care and expedition in prosecuting the work. (Gilmore *v.* Driscoll, 122 Mass. 199; 16 L. R. A. 330.)
>
> "If he goes beyond this without being requested or employed to do so by the owner, *and without it being necessary to preserve some right of his own,* and performs a duty which lies upon the owner, it is his voluntary act.
>
> "On the other hand, it may be said that it can be likened to the nuisance just mentioned (by the falling of an old wall or building on passersby) in that if the building should fall into the adjoining proprietor's land, it would disfigure it and prevent his use of it except he clear away the debris. And as he has the right to excavate

> the property he has the same right to the unencumbered use of it as excavated as he had before, and that he should also be secured in the safety of his workmen while engaging in excavating.
>
> "In Eads *v.* Gains (supra) the Court of Appeals sustained an action by an adjoining proprietor against the owner of an adjacent building for the reasonable expense of of shoring, etc. But the petition in that case alleged that upon the owner's refusal to secure his building *it became necessary* for the adjoining proprietor to do so to avoid great danger to his workmen engaged in the excavation. We have nothing of that kind in this case. There is no allegation direct or by inference that the work defendant refused to do and which plaintiff did do, was *necessary* in order to secure the latter *in any right.*"

The court in this case does not deny that if the work done was necessary in order to secure the plaintiff in any of his rights, the defendant would be under a duty to shore up his buildings, and that this duty he would owe to the plaintiff. This is in entire accord with the Eads case, and the only distinction made between the cases is that the plaintiff failed to allege the necessity for doing the work, in his complaint.

It is true that the purpose of giving the notice is to afford the adjoining owner the opportunity to protect his structures, and that where the rights of the plaintiff are not involved, this duty would be only owing to himself. But where, as in the Eads case and in the case at bar, the erection of the wall becomes necessary in order to preserve property rights of the plaintiff, and to permit him an unencumbered use of his property, this duty he owes also to the plaintiff. The Flannagan case does not deny this duty under circumstances like the present case.

The rules expressed in the Christensen case and in the Eads case have been reflected in other decisions throughout the country. In the case of *Hickman* v. *Wellauer,* 171 N. W 635, (Wisconsin) the court held:

> "As incident to plaintiff's ownership of his lot, he had the absolute right so far as his land was in its natural condition to lateral support from the defendant Wellauer's lot. So far as plaintiff had added to the weight of the soil by the erection of his building, for such additional load plaintiff himself must provide by proper support and care whenever defendant wished to exercise his right to excavate on his land."

In the case of *Lyons* v. *Walsh,* 92 Conn. 18; 101 Atl. 488, in the Supreme Court of Errors of that State, the facts were these: A retaining wall on the defendant's land had fallen into disrepair and parts of it were falling into plaintiff's land. The Court there allowed recovery for the damage done but refused a mandatory injunction ordering defendant to repair the wall on the ground that no irreparable injury was shown to exist, and there being not sufficient equity shown the injunction was refused.

In the case of *Davis* v. *Sap,* 152 N. E. 759, in the Court of Appeals of Ohio, the suit was brought by the excavator to recover damages for clearing out his excavation into which defendant's wall had fallen after defendant's failure to protect it upon proper notice. The Court allowed recovery in the following opinion:

> "When the retaining wall was built it was not built much below the surface of the soil and depended upon the plaintiff leaving his property in its natural state and furnishing support to said wall to prevent the same from sliding and tumbling down. This the

> defendant had no right to claim or expect as it amounted to a taking of the property of the plaintiff to and for the use of the defendant without compensation. The plaintiff had a right to use his property in any lawful manner that he saw fit and the defendant had no right to abridge or limit this by the construction of the wall and by making the fill it did.
>
> "We therefore hold that as the plaintiff, after notice to the defendant and in the exercise of ordinary care and without negligence, removed the lateral support of his soil from the soil of the defendant and the defendant's improvements fell upon the property of the plaintiff to his damage, which falling was due to the negligence of the defendant in the construction of its improvements, the plaintiff is entitled to recover from the defendant the amount of the damages sustained by him."

The California case of *First National Bank* v. *Villegra,* 92 Cal. 96, cited by the defendant, was decided under the code of that State and its decision cannot be controlling on the present question.

As has been previously stated, the question has not been decided in New Jersey. The precise facts and circumstances of the instant case were raised in the case of *E. M. Waldron Co.* v. *Aab,* 84 N. J. L. 24, in which the contractor performing excavation work on plaintiff's land sued to recover the cost of shoring the adjacent property from the owner of such property who refused to shore after notice. Recovery was denied on the ground that the contractor was not a proper party to bring the action. The opinion follows:

> "The interesting and important question argued by counsel for plaintiff and discussed and decided in Eads *v.* Gains, 58 Mo. App.

586, and Walters *v.* Hamilton, 75 Mo. App. 237, is not raised in this suit which is brought against the defendant not by the owner of the adjoining land but by a person having a contract with such owner to do work on such land.

"For expenditures made by one of such contracting parties in the performance of such contract, he must look to the other contracting party; whether successfully or not can be decided only in a suit between them. Obviously the plaintiff, by force of his contract with the owners of lots 37 and 39, has no privity or relation whatsoever with the owner of lot 35.

"The rule of law necessary to sustain plaintiff's contention arises, if at all, from some pseudo contract between the owners of adjoining lands, or upon some presumption of law or rule of public policy arising out of such adjoining ownership."

It must be stressed that appellant did not act as a mere volunteer in the instant case. Due and proper notice was given to the defendant and estimates of the cost of construction were submitted to him. Full opportunity was afforded him to comply with his duty and to support his land in order that appellant might fully enjoy his property rights. In the face of his absolute silence and his supine indifference to the appellant's rights, appellant could pursue no other course.

In all of the cases cited above the Courts clearly recognize a duty on the part of the defendant to shore up and protect his own property. If, after notice, the defendant fails to meet that duty and the appellant is then prevented from the full exercise of his property rights, the right is clear in the appellant to proceed to take whatever precautions are necessary and to charge the expense of such precau-

tions to the owner of the buildings, whose duty it was in the first instance to so protect his property.

Any other rule would work inexorable hardship upon the appellant. If he had proceeded with his excavation he would be subject to the criticism and possible liability for not using reasonable care. He would be faced with imminent and certain danger to his property and to the lives of his workmen, and interminable delay in the completion of his excavation. He would be compelled to continually remove the dirt and debris from defendant's land until the entire grade of defendant's lot would be changed. Further, should he continue to excavate without taking steps immediately to protect the other property and content himself with a suit in trespass for each successive slide of earth into his land, he would be met with the objection that he had done nothing to mitigate the damages which he had incurred. If, having no other alternative in the exercise of his just rights, he proceeded to erect a retaining wall or to shore up defendant's land and is not now allowed to recover the cost of such *necessary precautions,* an anomoly would result. Appellant while under no duty under the law to furnish lateral support, would thus be compelled to bear the expense of the construction and maintenance of such lateral support.

It has been further urged that the adjoining owner might not consider the value of his improvements great enough to justify the expense of protecting them. But, regardless of the value of his buildings or structures, we contend that being under a duty to furnish his own lateral support he cannot subject his neighbor with

this burden or deprive his neighbor of the free and unencumbered use of his lands merely because of his indifference.

We submit that the cases cited are not in conflict and constitute the leading authorities bearing upon this question. There is nothing in the law of this State contradictory to these decisions, and in the only reported case in this State the Court cites the Missouri cases with apparent approval.

We therefore most respectfully submit that the judgment striking out the second count of appellant's complaint may be reversed and set aside.

II.

Under the first count of the complaint recovery is sought upon a theory similar to that urged in the second count, except that we here allege a duty upon the defendant to shore up his property by virtue of Section 66 of the Building Code of the City of Newark. Because of the breach of this duty by the defendant, appellant was unable to continue his excavation and was deprived of the full enjoyment of his property rights, whereby it became necessary to erect the wall in question. It must be borne in mind that the only safe method and the cheapest one of shoring up defendant's property and protecting both parties was the construction of the retaining wall which was built. This is a matter of proof which appellant is ready to furnish.

Sections 63 to 66 of the Building Code of the City of Newark relate to excavations. Section 63 referring as it does to "earth," can be construed to apply only to land in its natural

For the reasons above presented, therefore, we most respectfully urge that the order striking out the first count of appellant's complaint may be reversed and set aside.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JOSEPH WEISBERGER, *Plaintiff-Appellant,* *vs.* HERMAN MAURER, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF OF DEFENDANT-APPELLEE.

Facts.

This is an appeal from a judgment of the Essex County Circuit Court, striking out the first and second counts of the complaint, on the ground that they did not set forth a cause of action against the defendant. For the purpose of the motion, the facts alleged in the complaint were taken as true. Briefly, they are: That plaintiff owned property, Nos. 25-27 Coe Place, Newark, and defendant owned property, No. 624 High street, adjoining on the west; that defendant's land was at a higher level than plaintiff's naturally, and had been filled in, and had garages and other structures placed thereon. The plaintiff was excavating not more than eight feet below the curb to which his land referred, thereby removing the lateral support which defendant's land had heretofore enjoyed. Plaintiff alleges that he gave due notice of his intention to excavate, and that defendant did nothing in response to said notice. Plaintiff alleges further that by the building code of the City of Newark, and more particularly Section 66 of said code, it became the duty of the defendant to erect a retaining wall at the rear of his property "to

protect and preserve the property of the defendant and to safeguard and support the filled-in land of defendant and the structures erected thereon by the defendant'' (State of Case, p. 3, ll. 18-25), at his own expense. Plaintiff alleges that defendant failed to do his duty and that he, the plaintiff, erected this wall at a cost of $8,700.50, and demands this sum from the defendant; in the second count, no mention is made of the building code or any duty it may have imposed on the defendant. The allegation is that, due to the difference in levels between the lands and defendant's negligence in not building a retaining wall, dirt and debris from defendant's land fell into plaintiff's excavation. Plaintiff alleges he erected that retaining wall, after giving notice, to prevent further injury and minimize damages and that it cost $8,700.50, which sum he demands.

ARGUMENT.

I.

The first and second counts of the complaint will be dealt with together, for they raise the same substantive question of law, although the first count is perhaps more open to attack as a matter of formal pleading.

The real question raised herein is, What are the rights and liabilities of adjoining land owners? The common law on the subject is laid down by Chief Justice Green in *McGuire* v. *Grant,* 25 N. J. L. 356 (1856) Supreme Court:

> ''The decided weight of authority and sound principle concur in support of the position that there is incident to land, in its natural condition, a right to support from the adjoining land; and if that land sinks

> or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained'' (at 368).
>
> ''It is well settled that where the owner of a lot builds upon his boundary line, and the building is thrown down by reason of excavations made upon the adjoining lot, (in the absence of improper motive and carelessness in the execution of the work) no recovery can be had for the injury done to the building'' (at 362).

Nothing therein gives any right to an excavator to protect adjoining property at the expense of the owner. There is no mention made of what are the consequences if the building is thrown down, except that the owner cannot recover for the damage. No affirmative duty is put upon the owner.

By statute the common law has been changed in case of excavations more than eight feet below the curb.

> ''Party making excavation to preserve wall on adjoining land from injury.—That whenever excavations hereafter commenced, for building or other purposes, on any lot or piece of land, shall be intended to be carried to the depth of more than eight feet below the curb or grade of the street, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times, from the commencement until the completion of such excavations, at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced.'' (Compiled Statutes 1910 Ed., Vol. 3, p. 3926, Sec. 1.)

This gives the owner of the building greater protection than the common law, if upon getting the notice, he gives the license mentioned. But it does not place upon him any affirmative duty to protect himself or even to allow the excavator to protect him, nor does it put any power in the excavator to do anything at anybody else's expense.

Plaintiff alleges in Paragraph 7 of the first count (State of Case, p. 3, ll. 26-37) that the building code of Newark imposed on defendant a duty to erect a retaining wall at his own expense. The pertinent sections of the building code are Sections 63, 64, 65, 66 and 68.

> "Sec. 63.—Excavation Precautions.
>
> 1. Until provisions for permanent support have been made, all excavations shall be properly guarded and protected so as to prevent the same from becoming dangerous to life or limb, and shall be sheet piled, braced or shored, where necessary, to prevent the adjoining earth from caving in, by the person causing the excavation to be made." (Building Code 1928, Revisions, page 39.)

This speaks only of the excavator and surely imposes no duty on the adjoining owner.

> "Sec. 64.—Retaining Walls.
>
> 1. When an excavation or fill is made on any lot, the person making such excavation or fill or causing it to be made, shall, at his own cost and expense (except as may be otherwise required by this Code), build a retaining wall to support the adjoining earth, and such retaining wall shall be carried to the height of the adjoining earth, and be properly protected by coping.
>
> 2. Every retaining wall shall be constructed of masonry or reinforced concrete, as approved by the Superintendent of Buildings, and the thickness of the base shall be

no less than one-quarter (¼) of its height." (Building Code, 1928, Revisions, page 39.)

This, too, imposes no duty on the owner.

"Sec. 65.—Excavations Exceeding 8 Feet.

1. When an excavation is intended to be, or shall be, carried to the depth of more than 8 feet below the curb, the person causing such excavation to be made shall at all times, if afforded the necessary license to enter upon the adjoining land, and not otherwise, at his expense, preserve and protect from injury any wall, building, or structure, the safety of which may be affected by said excavation and support the same by proper foundations, whether the said wall, building or structure is down more or less than 8 feet below the curb. If the necessary license is not accorded to the person making such excavation, then it shall be the duty of the owner refusing to grant such license to make such a wall, building, or structure, safe, and to support the same by proper foundations; and, when necessary for that purpose, such owner shall be permitted to enter upon the premises where such excavation is to be made." (Building Code, 1928, Revisions, pages 39-40.)

This section does not apply to this case, because the complaint alleges that the excavation work on plaintiff's land was not carried to a depth of more than eight feet below the curb to which it refers. Furthermore, there is no authority given to the city to make any regulations about excavations exceeding eight feet. The Legislature enacted the rule as to these, and that statute has been set forth above. The Legislature also set the limits on city authority over excavations, and the authority conferred is:

"Excavations. (X) To regulate excavations below the established grade or curb line of any street in any such municipality, not greater than eight feet, which the owner

> of any land may make, in the erection of any building upon his own property; and to provide for the giving of notice, in writing, of such intended excavation to any adjoining owner or owners, and that they will be required to protect and care for their several foundation walls that may be endangered by such excavation; and to provide that in case of the neglect or refusal, for ten days, of such adjoining owner or owners to take proper action to secure and protect the foundations of any adjacent building or other structure, that the party or parties giving such notice, or their agents, contractors, or employees, may enter into and upon such adjoining property and do all necessary work to make such foundations secure, and may recover the cost of such work, and labor, in so protecting such adjacent property; and to make such further and other provisions in relation to the proper conduct and performance of said work as the governing body or board of the municipality may deem necessary and proper." (Cum. Supp. Comp. St. 1911 Ed., Vol. 2, p. 2147, Sec. 136-1401-X.)

To regulate excavations not greater than eight feet cannot include the power to regulate those exceeding eight feet; for it has been repeatedly held that:

> "A municipal corporation being a creature of the state, possesses only such power as the state confers upon it. Breninger *v.* Belvidere, 44 N. J. L. 350. State (Terhune, Prosecutor) *v.* City of Passaic, 41 N. J. L. 90, 93. And, in construing a grant of power to a municipality, any fair, reasonable doubt concerning the existence of the power is resolved against the municipality, and the power is denied. Meday *v.* Borough of Rutherford, 65 N. J. L. 645, 648, 48 A. 529." *Shuster v. Ventor Gardens,* 102 N. J. Eq. 475, 141 Atl. 455; Aff. *Per Cur.* 102 N. J. Eq. 475, 144 Atl. 758.

See also *Messina* v. *Terhune,* 8 Adv. Rep. 108, 148 Atl. 728 (1930) where the rule is laid down by the Court of Errors and Appeals speaking through Mr. Justice Parker that the power to regulate, conferred by the same legislative grant as is under consideration in this case, does not include a power to require the excavator to insure against damage. The Legislature itself could impose such an obligation, and the courts have held that it did under the statute concerning excavations over eight feet when the excavator is allowed to enter on the adjoining lands, *Hirschberg* v. *Flusser,* 91 N. J. L. 66, 102 Atl. 353, Aff. 92 N. J. L. 515, 105 Atl. 893.

There remains for consideration only Section 66 of the code.

> "Sec. 66.—Excavations Not Exceeding 8 Feet.
>
> 1. If such excavation is not intended to be or shall not be carried to a depth of more than eight feet below the curb, the owner of any wall, building, or structure, the safety of which may be affected by said excavation, shall preserve and protect the same from injury, and support the same by proper foundations; and, when necessary for that purpose, shall be permitted to enter upon the premises where such excavation is to be made. In case such wall, building, or structure, however, is so located that the curb to which it is properly referred is at a higher level than the curb to which the excavation is referred, such part of the necessary underpinning or foundation as may be due to the difference in curb levels, shall be made and maintained at the joint expense of the person causing the excavation to be made, and the owner of such wall, building, or structure." (Building Code, 1928, Revisions, p. 40.)

It is necessary to treat the two halves of this section separately. The first sentence deals only with protecting the property of the adjoining owner. The duty is placed on him to protect his own property, and permission is given him to go onto the excavation to do so. Nothing is stated herein as to the rule if he fails to do so. Section 68 gives the Superintendent of Buildings the power to enter on his premises and do the work at his expense. Whether this power is within the legislative grant or not is not material as the Superintendent of Buildings did no work and brings no suit.

The second sentence deals with a situation not within the legislative grant. There is no power conferred to impose any duty on the excavator of less than eight feet to bear any expense. The provisions made for this contingency may be fair, but are illegal unless properly authorized. It is submitted that it is more than doubtful whether the power to charge the excavator with part of the costs is given and whether any power is given to vary the rule due to a difference in curb levels. The rule is that doubts are resolved against the municipality. *Meday* v. *Rutherford,* 65 N. J. L. 645, 48 Atl. 529.

But whether the code be authorized legislation or not, it does not aid the plaintiff in this case. Plaintiff states that it was the defendant's duty to build the wall at his own expense entirely. The code does not support this, if the necessity for the wall arose from the difference in curb levels, the code at best for the plaintiff entitles him to but one-half. Plaintiff seeks to recover for the cost of a retaining wall necessitated by the weight of the structures on defendant's land; the ordinance in this section deals only with

"underpinning and foundation as may be due to the difference in curb levels." Plaintiff seeks to recover for expense he incurred in doing what he alleges was the defendant's duty. The code provides the Superintendent of Buildings may do the work and charge the defendant, but not this plaintiff nor any other person can do so and charge the defendant what they see fit to spend. Even though it was the defendant's duty, no one but the Superintendent of Buildings could do it for him with any expectation of recovering the expense of the work. Plaintiff, as adjoining owner, is given no greater right by the code, than an owner on the opposite side of the city. Either party, if he does the work, does so as a pure volunteer, and as such can maintain no action. *McCrory Stores Corporation* v. *S. M. Braunstein, Inc.*, 99 N. J. L. 166, 122 Atl. 814; *Schaedel* v. *Liberty Trust Co.*, 99 N. J. L. 380, 123 Atl. 714.

The ultimate difficulty with plaintiff's action is that the whole code not only does not authorize it directly or indirectly, but fails to even contemplate it. Plaintiff's complaint is that, due to the excavation, defendant's property fell into his, and to keep it out he built the retaining wall. That is the one thing not referred to in all the legislation referred to above. All the provisions and rules deal with protecting the non-excavator; none with the protection of the excavator. If this be his complaint, he must look elsewhere for relief than in the code. Defendant has looked in vain for any case in this state granting any such relief. In only one case which defendant was able to discover was the matter referred to, namely: *E. M. Waldron & Co.* v. *AAB*, 84 N. J. L. 28; 86 Atl. 61 (1913) Sup. Ct. In that case, the plaintiff alleged that it was excavating next door to the defendant under contract with the

owner. That to protect the excavation and make it safe to work there, the defendant's building had to be shored-up and plaintiff gave notice to the defendant to do so herself, or it would be done at her expense. She did not, and plaintiff did. The suit was for the expense. Judgment was given for the defendant on demurrer. The opinion of the Court is here given in full:

> "The interesting and important question argued by counsel for the plaintiff, and discussed and decided in Eads *v.* Gaines, 58 Mo. App. 586, and Walters *v.* Hamilton, 75 Mo. App. 237, is not raised in this suit, which is brought against the defendant, not by the owner of adjoining land, but by a person having contract with such owner to do work on such land.
>
> "For expenditures made by one of such contracting parties in the performance of such contract he must look to the other contracting party; whether successfully or not can be determined only in a suit between them. Obviously, the plaintiff by force of his contract with the owner of lots 37 and 39 has no privity or relation whatsoever with the owner of lot 35.
>
> "The rule of law necessary to sustain the plaintiff's contention arises, if at all, from some psuedo contract implied in law between the owners of adjoining lands or upon some presumption to law or rule of public policy arising out of such adjoining ownership.
>
> "The plaintiff having shown no right of action against the defendant, judgment on demurrer is given for the defendant." (Per Garrison, *J.*)

Of the two Missouri cases cited therein, *Eads* v. *Gaines,* 58 Mo. App. 586 (1894) St. Louis Court of Appeals (an intermediate court), is the one that holds the plaintiff may recover for the expense he incurred in shoring-up defendant's

building to prevent it falling into his excavation and "to avoid great danger of injury to the men engaged by plaintiff." The Court reasons that since plaintiff owed no lateral support to the building and had a right to excavate, to force him to pay for holding up the adjoining building is to force him to furnish lateral support. The other case cited, *Waters* v. *Hamilton,* 75 Mo. App. 237 (1898) Kansas City Court of Appeals (an intermediate court) merely cites the Eads case approvingly in dealing with a situation where the suit is against the excavator for damages done to a building and for trespass committed by the excavator; the opposite situation. But the authority of the Eads case has been impaired in *Flanagan Bros. Mfg. Co.* v. *Levin,* 142 Mo. App. 242; 125 S. W. 1172 (1910) Kansas City Court of Appeals (an intermediate court). The facts in that case are the same as in the Eads case, except that plaintiff did not allege that the shoring was necessary to "avoid great danger of injury to the men engaged by plaintiff." The Court held the failure to so allege distinguished the two cases and the plaintiff could not maintain a suit for the cost of shoring. The reason for the decision stated by the Court was that after notice the owner of the building owes a duty to shore, but he owes it to himself. His failure to perform the duty was not a breach to the plaintiff and that plaintiff was a mere volunteer and could not recover. None of these cases appear to have gone to the Supreme Court of Missouri. The reasoning of the Court in deciding the Eads case was that the owner of the building had to pay for the shoring done by the excavator because he owed him a duty to shore. In the Flanagan Bros. case, the Court denies this flatly and says the duty to shore was one owed

by the building owner to himself and the excavator could not charge him with the costs of his voluntarily performing it for him. This case being later and decided by a court of equal jurisdiction greatly weakens the Eads case as an authority.

Defendant has been able to find but few other decisions in point. In *First National Bank* v. *Villegra,* 92 Cal. 96, 28 Pac. 97 (1891) Supreme Court, the decision is against the excavator who seeks the cost of shoring, on the ground that he did the shoring as a mere volunteer. In *Davis* v. *Sap,* 152 N. E. (Ohio) 759 (1922) Court of Appeals (an intermediate court), the suit was brought by the excavator to recover damages for clearing out his excavation into which defendant's wall had fallen, due to defendant's failure to protect it after proper notice. The court allowed recovery, and reviewed the California and Missouri cases, and came to this conclusion:

> "From a careful reading and study of the foregoing cases one will find the principle announced to be that the excavating landowner cannot volunteer to protect the property of the adjoining owner and prevent improvements from falling upon the land of the excavator, and charge the expense to his neighbor, when the neighbor is willing to take the risk and be accountable for any damage resulting therefrom." (Per Pardee, *J.*)

The Court discusses one other case, namely: *Lyons* v. *Walsh,* 92 Conn. 18; 101 Atl. 488 (1917) Supreme Court of Errors. In that case, the retaining wall on defendant's land was falling into disrepair, and parts of it were falling onto plaintiff's land. The Court allowed recovery for dam-

age done already, but refused a mandatory injunction ordering defendant to repair the wall.

So far as defendant has been able to discover, the above is all the authority in point upon the question. It is submitted that these authorities do not support plaintiff's action. It is further submitted that these authorities are correct upon principle and should be followed. In the absence of direct statutory authority for such a course, the courts should not establish so dangerous a doctrine as plaintiff seeks. There is no need for it; the common law gives full protection to the excavator. If he is properly excavating within his rights, and the adjoining building is endangered so that a dangerous situation is created, the public authorities may abate the nuisance. If the building falls but does not fall onto the excavation it is no affair of the excavator. If it does fall upon the excavation, a trespass has been committed by the owner of the building. For his trespass he is responsible in damages, in the same manner that any other trespasser is responsible. No one would maintain that, if I threatened to walk on a man's land he could put up a fence at my expense to prevent my trespass. The principle is the same if I threaten to throw something on his land, or to let it fall thereon. If I own a shack worth less than the cost of protecting it, it seems very high handed to allow the adjoining owner or any other private person to protect it, regardless of cost, at my expense. It may fall and do no damage; it may not fall at all; and it may fall and do a few dollars' worth of damage. Protection on the other hand may cost thousands. The law never favors officiousness; and treats volunteers as interlopers entitled to no relief.

It is submitted that on principle and authority the plaintiff has no cause of action against the defendant for the cost of the retaining wall voluntarily put up by the plaintiff.

It is respectfully submitted, therefore, that the first and second counts of the complaint disclose no cause of action, and the judgment under review should be affirmed.

Respectfully submitted,

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Attorney for and of Counsel with
Defendant-Appellee.